Supreme Court, U.S.
FILED

No. 941506 MAR 13 1995

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

JEROME S. WAGSHAL,

Petitioner, Pro se

v.

Maurice Bramon, et al.

and

BARNETT BANKS, INC., et al.

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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March 13, 1995

QUESTIONS PRESENTED

1. Does a class member who objects to a proposed settlement of a class action lack standing to appeal the district court's order approving the settlement because of failure to intervene pursuant to Rule 24, Fed.R.Civ. P., when the class member responded by objecting in writing to the Rule 23(e) notice inviting the class member, "to participate in the class action on your own behalf," and the class member thereafter **participates fully as a party to the proceeding**?

(The phrase, "**participates fully as a party to the proceeding**," in the preceding sentence includes filing a written objection to the settlement, appearing at the hearing on the settlement, being admitted *pro haec vice* as a member of the Bar of the court, and participating in the hearing by presenting testimony and evidence and presenting argument, and thereafter, pursuant to the court's invitation, submitting proposed

findings of fact and conclusions of law, and submitting various pre-hearng and post-hearing motions, all of which are ruled upon as if he were a party to the proceeding, and is the only objector specially served with a copy of the court's order approving the settlement, and thereafter--following appeal of the approval of the settlement, and remand to the district court during the appeal process--serving interrogatories on both plaintiffs and defendants to which they respond with no challenge to the objecting class member's entitlement to engage in discovery as a party.)

2. Even if Rule 24 intervention is a prerequisite for appellate standing by a member of a plaintiff class objecting to a class action settlement, are (i) a granted motion for admission *pro haec vice*; (ii) receipt by the district court of testimony and documentary evidence submitted by the objecting class member at the hearing on the settlement; (iii) receipt by the district

court of various written motions from the objecting class member both before the hearing and afterwards, and rulings on such motions as if the objecting class member were a party to the proceeding; and (iv) being listed among the recipients of judicial rulings in the case, each individually or all taken together, sufficient indications that the district court has granted the objecting class member leave to intervene as a party, so as to create appellate standing?

PARTIES IN THE PROCEEDINGS BELOW

Plaintiffs: Maurice Bramon, John Paul Decker, John Heller, Harvey Karp, Richard Rosenberg, Theodore Rosenberg, Donald F. Sullivan, Florence W. Sullivan, Howard Weiner.

Interested persons also include all holders of Barnett Bank equity securities, and more particularly, members of the plaintiff settlement class, to wit:

> [A]ll persons or entities, and their successors in interest, who purchased, reinvested in, or otherwise acquired Barnett Equity Securities, namely common and preferred stock issued by Barnett Banks, Inc. ("Barnett") or any security which was converted into an equity of Barnett subsequent to its issuance, between August 15, 1988 and August 15, 1991, inclusive (the "Class Period") other than Defendants...and their officers directors, partners or employees [etc.]

Barnett has stated that it sent out approximately 80,000 notices of the proposed settlement, which is the best indication of the number of stockholders involved.

The Petitioner, Jerome S. Wagshal, is a

Barnett stockholder, and a member of the settlement class.

Defendants: Barnett Banks, Inc., and all subsidiaries and affiliates thereof, the identity of which are unknown to petitioner. Albert D. Ernest, Earl B. Hadlow, Stephen A. Hansel, Allen L. Lastinger, Jr., Charles W. Newman, Charles E. Rice,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Jerome S. Wagshal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The two-sentence opinion of the Court of Appeals, dismissing on the ground of lack of standing (App. A, *infra*), is not reported, by order of the court. The disposition is noted in a table at 38 F.3d 572 (11 Cir. 1994).

GROUNDS FOR JURISDICTION IN THIS COURT

Petitioner's petition to the Court of Appeals for rehearing was denied on December 13, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The issue raised by this petition implicates Rules 1, 8, 23, and 24, Fed.R.Civ.P. The relevant provisions are set out at App. E.

STATEMENT OF THE CASE

This petition raises the issue of standing to appeal an order of settlement of a class action: whether a member of the settlement class who responds to the Rule 23 notice of settlement by objecting in writing, appearing at the hearing on the settlement pursuant to the invitation in the notice to pursue that objection, and participates fully as a party to that hearing with all of the indicia and attributes of a party--including calling witnesses, presenting evidence, presenting argument, submitting proposed findings of fact and conclusions of law by invitation of the court, thereafter making motions and engaging in discovery--and who is treated *de facto* as a party throughout the entire proceeding including being admitted as an a member of the bar of the court pro haec vice--nevertheless lacks standing to appeal the order approving the settlement simply

because he[1] neglected to move to intervene.

As hereinafter described, this ruling raises a fully matured, direct conflict among the circuit courts.

* * *

The plaintiffs (hereinafter "Bramon") brought this securities class action in March 1990 against Barnett Bank and its officers (hereinafter "Barnett") after a Federal audit disclosed major defects in Barnett's reserves. After pretrial proceedings, including denial of a Barnett motion to dismiss, the Bramon attorneys and Barnett agreed on a settlement plan, and disseminated notice of the plan.

Petitioner (hereinafter "JSW"), a class member, received the notice, which stated:

> If you are a Class Member and wish to participate in the class action on your own behalf, you may, if you so desire, enter an appearance through counsel of your own choosing.

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1. References to the masculine in this petition are solely for ease of expression, and are intended to be understood as gender neutral.

Objecting class members were given no further notification or instruction of anything to be done to become a full-fledged party to the proceeding.

Relying on this notice, JSW filed a timely written objection to the settlement plan because it gave nothing of value to the class except limited-term warrants which were clearly destined to be worthless, but $300,000 to the Bramon attorneys.[2]

As it turned out, the warrants were indeed worthless. Barnett stock never rose to a level during the relevant period sufficient to give them any value. They were never traded. Thus the net result of the settlement was that the Bramon lawyers received $300,000.00, and the class members

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[2]. A Barnett officer subsequently admitted that the warrants were "way out of the money," and were never expected to have any value, and that the only persons who were expected to profit from the settlement were the lawyers who sued Barnett. The Barnett officer made this admission to petitioner during the appellate process, after the district court's ruling. Petitioner notified the Court of Appeals of this admission in his brief. Barnett did not deny it.

got nothing, not even reimbursement for their postage in applying for the worthless warrants. In short, this was a classic case of faithless representation by plaintiff's attorneys who negotiated a generous payout for themselves and nothing for the class they were supposed to represent.

Following JSW's original written objection submitted in response to the notice, which was answered by both Bramon and Barnett as if he were a party, JSW appeared at the January 3, 1992, hearing on the proposed settlement, and, being an attorney in good standing in the District of Columbia, was admitted to the Bar of the Court *pro haec vice*--for that case. JSW had thereby done all he had been instructed to do by the notice "to participate in the class action on [his] own behalf," and more.[3]

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3. Petitioner maintains that his admission *pro haec vice*, done pursuant to the notice inviting him, "to participate in the class action," was, under *Farina v.Mission Investment Trust*, 625 F.2d 1068 (5th Cir. 1980), tantamount to the grant of intervention, if intervention was required. *See, infra*, p. 21.

JSW was thereafter treated as a fully participating party at the hearing and in subsequent proceedings, both by the court and by his adversaries, Bramon and Barnett. At the hearing itself, after admission *pro haec vice*, JSW questioned a witness, introduced an exhibit, and presented argument to the court, all of which was noted by the court. See App. C,, p. C-30, Conclusions of Law, para. 11. At the end of the hearing, the Court addressed all participants, including JSW, to schedule submission of proposed findings of fact and conclusions of law.

After the hearing, JSW submitted proposed findings and conclusions of law, and actively participated in an extensive motion practice.[4] (Under Rule 11, Federal Rules of Civil Procedure, only a party may make a motion, the only exception being a motion for leave to intervene under Rule 24, which may

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4. Post-hearing motion practice in which JSW participated included docket nos. 194, 205, 197, 198, 199, 201, 204, 208, 209, 210, 213, 214, 215, 216, 224, 226, 217, 221, 227, 228, and 229.

be made by "anyone.") Neither Bramon nor Barnett ever challenged JSW's standing to make a motion, and the court never suggested that JSW lacked standing. His standing as a party was conceded *sub silentio* by all.

The district court approved the settlement on January 31, 1991. JSW thereafter filed a Rule 52(b) motion, and other motions, all of which was denied, but none because of lack of standing as a party. *See* App. D. JSW's appeal followed.

The court of appeals first questioned the timeliness of JSW's notice of appeal because it related to JSW's Rule 52(b) motion in the district court, and it remanded for a determination of the timeliness of JSW's Rule 52(b) motion in the district court. On remand, JSW served interrogatories on Bramon and Barnett, both responded without objection, and their answers were subsequently filed. Again, under Rule 33(a), Fed.R.Civ.P., only a party may engage in

discovery. On this remand, despite a fierce effort to disqualify JSW on a Rule 52(b) basis, neither Bramon nor Barnett ever challenged his standing as an intervening party, again conceding the point *sub silentio*. On June 9, 1993, the district court determined that JSW's Rule 52(b) motion was timely. Thereafter briefing proceeded.

After all this procedural history during which JSW's standing was inferentially conceded, the Bramon and Barnett briefs raised the standing issue for the first time, relying on the *Guthrie* line of authority (as hereinafter described). Appellant's reply brief argued that: (i) under the *Farina* line of authority (as hereinafter described), he had standing, and, alternatively, (ii) that *Guthrie* was wrongly decided.

On October 13, 1994, the panel issued an unpublished disposition of the case stating: "We conclude that Appellant has no standing. Guthrie v. Evans, 815 F.2d 626 (11th Cir.

1987). Accordingly, this appeal is DISMISSED."

BASIS OF JURISDICTION IN THE DISTRICT COURT

The amended complaint grounded the district court's jurisdiction on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 787aa, and Section 22 of the Securities Act of 1933.

REASONS FOR ALLOWANCE OF THE WRIT

1. A Major Conflict In Circuits Exists

The lower court dismissed this appeal based on a rule denying appellate standing to class members who object to class action settlements but are not formally permitted to intervene. This rule raises a long standing direct conflict involving eight circuits on an issue of national importance which is ripe for resolution by this Court.

The rule that a class member who receives notice of a proposed settlement of a class action and appears to object to the settlement may appeal a district court ruling

approving the settlement without formally intervening, is followed by the Third, Seventh, and Ninth Circuits.[5]

The contrary rule--that a class member appearing pursuant to notice and objecting to a settlement has no standing to appeal approval of the settlement absent formally intervening in the district court--has been adopted by the Fifth, Sixth, Eighth, Tenth, and--as exemplified by this case--the Eleventh Circuit.[6]

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5. Third Circuit: *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1308-10 (3d Cir. 1993); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993). Seventh Circuit: *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); *Armstrong v. Board of School Directors*, 616 F.2d 305, 327-28 (7th Cir. 1980). *Accord, Paterson v. Stovall*, 528 F.2d 108 109 n. 1 (7th Cir. 1976). Ninth Circuit: *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977). *See also, In the Matter of VMS Ltd. Partnership Sec. Litigation*, 976 F.2d 362, 368 (7th Cir. 1992).

6. *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shults v. Champion Intern.Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992), *cert.denied*, 113 S.Ct. 1251 (1993); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); and *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987). Other decisions in several of these circuits, however, do not apply the standing disqualification. *See, e.g., Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir. 1981); *In*

This almost evenly balanced conflict among the circuits[7] is direct and palpable, and has been acknowledged by the courts on both sides of the issue. Thus in *Carlough v. Amchem Products, Inc., supra,* 5 F.3d at 713, a case following the rule that objecting class members have appellate standing without formal intervention, the Court noted that holdings which preclude appeals by class members "are directly contrary to our own holding in *Ace Heating & Plumbing Co., Inc., v. Crane Co.,* 453 F.2d 30 (3d Cir. 1971)."

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re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1542 (11th Cir. 1987)(although court stated that class member may preserve appeal from class settlement by objecting to terms of settlement, none of the parties raised issue of standing or the *Guthrie* decision, decided some six months earlier).

7. By petitioner's count, *supra*, the score stands 5 against standing and 3 for, so that a change of one in the majority would create a 4-4 tie.

It noteworthy that the most respected text writers on Federal procedure favor the rule permitting appeal by class members who appear and object at the district court level, without intervening. *See, Moore's Federal Practice,* Sec. 23.1.24[3], and 7C Wright, *Federal Practice & Procedure,* Sec. 1839, at 182 (1986), cited in *Bell Atlantic Corp. v. Bolger, supra,* 2 F.3d at 1307. *See also,* 7B Wright, Federal Practice and Procedure Sec. 1797 at 360-61 (1986), cited in *Silber v. Mabon,* 957 F.2d 697, 700 (9th Cir. 1992.)

Similarly, although *Shults v. Champion Intern. Corp., supra,* 35 F.3d at 1059, went the other way and adopted the requirement of formal intervention as a condition for appellate standing, the court nevertheless acknowledged that "the federal courts of appeals have taken various approaches," in what it referred to as "this unsettled area of the law....." Thus, although each decision in the two lines of authority has individual wrinkles, and strained efforts have been made to attempt to reconcile them based on irrelevant distinctions,[8] the issue of whether a class member needs to move successfully to intervene in the district court in order to appeal an unsuccessful opposition to a class settlement is a true, fully matured circuit conflict ready for authoritative resolution by this Court.

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8. *See, e.g., Gottlieb v. Wiles, supra,* 11 F.3d at 1009-11, text and n. 5 presenting a complex and unpersuasive disagreement with both the Third and Seventh Circuits' analysis of past cases on this standing issue.

Three points stand out from the long list of decisions pro and con on this issue:

First, eight of the thirteen circuits have had occasion to consider this problem, some on multiple occasions. Thus, this issue is neither localized in its focus nor rare in its occurrence.

Second, the issue has been subject to varying rulings in the Federal judicial system since at least 1970, when *Research Corp. v. Asgrow Seed Co., supra,* was decided, and has continued unresolved for a quarter century to the present time. The discussion of all facets of this issue in the many circuit courts which have considered it has established an ample foundation for a definitive determination by this Court.

Third, the position of those circuits which have spoken has hardened, as witness the summary disposition of the present appeal where the court did not even bother to write an opinion despite growing authority on the

other side. Thus the logic of neither side has served to persuade the other after more than a generation. Only this Court's intercession can bring needed uniformity.

2. Issues of Basic Fairness Are Raised By The Position Denying Standing In This Conflict Of Circuits

Petitioner maintains that the cases denying standing were wrongly decided. Although a full-scale discussion of the merits of the issue must await what hopefully will be the grant of certiorari, nevertheless some preliminary observations will underscore the importance of such a grant.

Rule 23, Fed.R.Civ.P. embodies the fundamental principle of procedural due process which mandates that a party affected by a potential judicial determination must be given the best practicable notice of the case and an opportunity to be heard. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The cases denying

objectors standing to appeal improperly limit that constitutional entitlement to the district court level, and that is not enough to provide full justice.

The Federal judicial structure is grounded on the implicit principle that trial courts can err and a higher authority is needed to render the best possible justice to the citizenry, indeed, sometimes two levels of higher authority. The decisions which deny appellate standing to class settlement objectors deny them such full-scale justice, and thus violate the constitutional principles at the heart of Rule 23.

The principles which require giving class members an opportunity to challenge settlements do not evaporate beyond the district court level. Therefore, a class member's objection at a settlement hearing should be deemed to be either an alternative to or tantamount to an intervention for purposes of appellate standing.

3. This Court Should Not Permit The Creation Of Semi-Parties To Litigation

The circuits adopting the requirement of formal intervention as a condition of appellate standing have, as a practical matter, created a novel form of semi-participant in the judicial process, hitherto neither known nor defined in the law, namely a "semi-party" who is entitled to participate in a case *at the trial court level only,* but without a right to appeal an adverse decision.

This Court should prevent the creation of such a half-parties. Such a novel status surely raises potential problems beyond any hypotheticals which could be imagined.

4. Both The Logic And Practical Concerns Of The *Guthrie* Case Should Be Reviewed By This Court

The cases restricting appellate rights to formal interveners stem from *Guthrie v. Evans, supra,* in which the court's overriding concern was administrative efficiency in

handling class actions and its objective was clearly to restrict appeals by class objectors so as to prevent class actions from becoming "unwieldy." 815 F.2d at 629. However, *Bell Atlantic Corp v. Bolger, supra,* considered the same issue and concluded, 2 F.3d at 1310, that the potential disadvantage of possibly making class actions "unwieldy" by permitting objectors to appeal class settlement approvals was outweighed by the advantage to the court of giving appellate standing to objectors when representative plaintiffs join with defendants in promoting a settlement and "judges no longer have the full benefit of the adversarial process."[9]

If such a balancing test is the proper

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[9]. *Bell Atlantic* was a shareholder derivative action under Rule 23.1, Fed.R.Civ.P., rather than a class action under Rule 23. The court in *Bell Atlantic* did not treat this as a meaningful distinction, and petitioner maintains that the court was correct, since there is no meaningful difference between the two rules with respect to the instant standing issue. See *Gottlieb v. Wiles, supra,* 11 F.3d at 1007, for an example of a court which considered the same "balancing" issue, and came to the opposite result, thereby further demonstrating the basic conflict between the two lines of authority in the eight circuits.

road to decision then petitioner is confident that this Court will not find the "unwieldy" chimera imagined by those circuits which follow *Guthrie*. A quarter century of judicial history in those circuits which grant standing to class member-objectors of settlements fails to demonstrate any undue interference with the efficient operation of the judicial process by granting standing.

This case embodies the real-life balance of "unwieldy[ness]" versus fairness which was considered in *Bell Atlantic, supra*. On the one hand, all judges who must deal with this case have an understandable interest in ridding their docket of a case which the district court characterized as "one of the most complex, expensive and potentially longlasting cases that is on the docket in the Middle District of Florida." App. C, p. C-27, Conclusions of Law, para. 9.)

On the other hand, this class action settlement--where plaintiffs' lawyers are

bought off by $300,000.00 and the class they were allegedly representing got absolutely nothing--begs for an outside challenger on appeal.[10] The fact that only a few class members took the time to object to this faithless class representation can be read as resignation that this is the way the system works in real life, rather than any agreement that the result was just. And if this petitioner is simply brushed aside in this case without even being accorded the status of a party entitled to appeal, the message as to how the system works for lawyers and how differently for the public will not be lost.

5. Guthrie Can Be Read As Merely Requiring A Hypertechnical Motion

Although it is somewhat murky on the point, *Guthrie* indicated that an objecting

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[10]. See App C, pp. C - 35-36, where the district court dealt with this point and could find no Federal appellate precedent for an attorney's fee paid in cash where the class members received only "non-monetary" compensation. If the Bramon attorneys had confined their fee award application to an award of the same warrants they obtained for the class, petitioner would not have challenged the settlement.

class member could intervene as of right. 815 F.2d at 628. If so, then the true significance of *Guthrie*, and the cases which follow it, is hypertechnical rather than substantive--simply that objecting class members must remember to take the formal step of moving to intervene in order to preserve their appellate rights. Read in this light, *Guthrie* elevates Rule 24 beyond its reasonable bounds, and represents a major jurisprudential departure by the Eleventh Circuit from a more liberal view it held only two years earlier. In *Piambino v. Bailey*, 757 F.2d 1112, 1121 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), the court brushed aside a challenge to an objecting class member's appellate standing, relying on *Farina v. Mission Investment Trust*, 625 F.2d 1068, 1075 (5th Cir. 1980), where the court treated a motion to remove as motion to intervene, "noting that a contrary position would render federal pleadings excessively

technical contrary to Fed.R.Civ.P. 8(e)(1) and 8(f))." The *Guthrie* holding on class objectors' standing is contrary to this liberal approach. *Guthrie* is also contrary to the principle that, "The Rules of Appellate Procedure 'were not adopted to set traps and pitfalls by way of technicalities for unwary litigants.'"[11]

Based on *Piambino, supra,* petitioner argued in the court of appeals that his motion for admission *pro haec vice* was, by the *Farina* standard, a motion to intervene, a major point which was ignored by the court's curt dismissal, and which should be considered here even if *Guthrie* were to be approved.

Of course, if objecting class members cannot intervene as of right then they would be thrust into a "Catch-22" position of being told that their interests are adequately

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11. *Willis v. Newsome,* 747 F.2d 605, 607 (11th Cir. 1984), quoting in part *Des Isles v. Evans,* 225 F.2d 235, 236 (5th Cir. 1955).

protected by the very consortium of plaintiff's lawyers and defense lawyers whose settlement agreement they are objecting to.

6. The *Marino* Decision Indicates That Review Is Appropriate In This Case

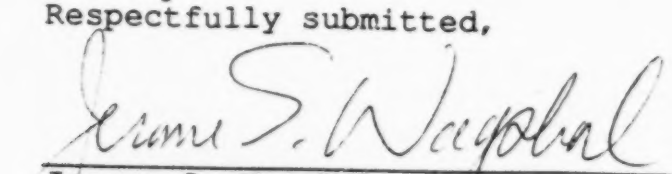
Many of the recent decisions involving objecting class members who attempt to appeal without prior formal intervention cite *Marino v. Ortiz*, 484 U.S. 301 (1988), as an apposite recent decision by this Court. However, the obvious answer is that *Marino* set out the rules only for aggrieved *non*-class members. A definitive ruling regarding the appellate rights of objecting class members is no less important, and would provide a needed balance to the *Marino* decision by establishing the status of objecting class members.

CONCLUSION

This Court should issue its writ of certiorari to review the lower court's decision, because that decision was based on a strongly disputed rule which involves a conflict among eight circuits, and which will affect the

administration of justice adversely in those circuits in which it is followed.

Respectfully submitted,



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